NTSB Order No.
EM-20

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of January 1972

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

FREDERICK N. POWE

Docket ME-16

OPINION AND ORDER

The appellant, Frederick Napoleon Powe, has appealed from the decision of the Commandant sustaining the revocation of his merchant mariner's document (No. Z-198893-D8) and all other seaman's documents for misconduct in violation of 46 U.S.C. 239(g).[1] It was found that appellant had committed a seaman's offense while he was employed as a cook/baker aboard the SS AUSTRALIAN GULF, by having wrongful possession of marijuana on November 24, 1968, at Pier 5, Brooklyn, New York, where the vessel was then berthed.[2]

The offense was found proved and the revocation order imposed initially by Coast Guard Examiner Walter E. Lawlor, after a full evidentiary hearing. The Commandant's action followed a prior appeal taken to him (Appeal No. 1799) from the examiner's initial decision.[3] Throughout the proceedings herein, appellant has been represented by counsel.

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[1] Appeal to this Board from the Commandant's revocation action is authorized under 49 U.S.C. 1654(B)(2) and is governed by the Board's rules of procedure set forth in 14 CFR 425.

[2]Regulations of the Commandant governing proceedings of marijuana is an offense among those for which revocation of documents is sought by the coast Guard. See also, section 137.20-165(b), Group F.

[3]Copies of the decisions of the Commandant and the examiner are attached hereto.

The examiner's factual findings, in essence, were that appellant was stopped and searched by a customs inspector upon leaving the Pier 5 area. In the course of the search a small paper bag dropped near his feet, and the contents of the bag, upon being weighed and analyzed by a customs chemist, were determined to be 66 grams, equivalent to 2.3 ounces, of marijuana. The evidence consisted of testimony from the inspector and the chemist, as well as the latter's laboratory report, received in evidence without objection.

Appellant was not in attendance during his hearing, and no evidence was adduced in his behalf. Review of the record satisfies us that this was his own choice. He appeared only once before the examiner, in response to the hearing notice. On being advised of his right to counsel, he made his designation and has not since withdrawn it. Counsel for appellant, not appearing at that time, made written application for a continuance, which the examiner granted.

The examiner granted three subsequent continuances due to appellant's absences (excusable in the first two instances) before he proceeded with the hearing more than 5 months later. Appellant's counsel admitted on the record that the continuing absences of his client were unexplainable since he had "made every effort to correspond with him" to no avail (Tr. 13). Counsel then indicated that he was ready to proceed, and, while the issue is not raised, we would not hesitate to hold under these circumstances that appellant was afforded his full opportunity to be heard in his own defense.

The contested issues at the hearing were whether appellant actually had possession of the bag of marijuana seized during the customs search and whether the search itself was valid, since the customs inspector had acted without a search warrant. Neither the chemist's testimony nor his report was challenged. The examiner determined that the evidence was prima facie "conclusive against [appellant], "and the Commandant found no reason to disturb his findings.

On this appeal, appellant contends that the examiner's decision is contrary to the weight of the evidence and that the sanction is excessive. He consolidates with his appeal the numerous contentions and arguments advanced heretofore in briefs to the examiner and the Commandant. Counsel for the Commandant has filed a brief in opposition.

Upon consideration of the parties' briefs and review of the entire record, this Board agrees with the examiner in concluding

that a prima facie case of appellant's misconduct was established by substantial evidence of a probative and reliable character. The examiner's findings, as affirmed by the Commandant, are adopted as our own, to the extent not modified herein. Moreover, we agree that the sanction imposed for appellant's offense is warranted.

Appellant makes no arguments in support of his contentions on appeal. One of his arguments to the examiner appears to challenge the competency of the customs inspector as a witness to the search and seizure conducted by him without a search warrant, and the weight assigned to such testimony. We find no merit in this argument.It is well settled that customs officers, acting without search warrants, have authority to stop persons within or adjacent to international port facilities, particularly enclosed piers such as the one here involved, and subject such persons to reasonable "border" searches.[4]

Other arguments to the examiner relate, in general, to the fact that all possibilities that the bag of marijuana belonged to someone other than appellant were not eliminated by the customs inspector's testimony. In our view, appellant's ownership of the bag was established to the exclusion of every other reasonable possibility, in the absence of any countervailing evidence.

The customs inspector testified that he and a partner officer were performing a routine patrol of the waterfront piers in the Manhattan-Brooklyn area on the date in question, assigned to stop seamen leaving the piers to determine whether they had anything to declare under the customs laws. During the early afternoon, they observed appellant and another seaman within the Pier 5 area approaching the gate leading to the public street. The officers stopped the two seamen inside and "proceeded to ask them routine questions and conducted a routine examination of their persons" (Tr. 17). While the witness was occupied with the appellant, his partner was likewise examining the other seaman "about 8 feet away" to appellant's right side (Tr. 19).[5]

Appellant, wearing a trench coat, was first asked if he was a seaman and, upon acknowledging that he was, to produce his seaman card, which he did (Tr. 32). The next question put to him was

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[4] See United States v. Glazious (2d Cir., 1968) 402 F. 2d 8, cert. den. 393 U.S. 1121 (1969); United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal., 1952); and cases cited therein.

[5] The other seaman, who remained unidentified, was released after his customs examination. The witness did not know whether the two seamen had been together previously (Tr. 19).

whether he had anything on his person that he had failed to declare to customs and appellant replied that he did not. Asked if there was anything in his coat, appellant again said "no," whereupon the inspector felt the coat and asked him to open it. In reaching inside across the small of appellant's back, the inspector felt a soft bulge "like a wad of paper" near the right hip pocket (Tr. 18).

Asked to remove what was in his pocket, appellant complied by producing various personal articles, but none resembling the paper object. The inspector put his hand back to the same spot and felt nothing there, but moving his hand from the "right to the left side" along appellant's back, he "felt this paper item again, then. . . heard a sound. . . [and] looked down to the ground, "where he saw a paper bag lying 5 or 6 inches from appellant's left foot (Tr. 18). He described the bag as having the top rolled down and measuring"around 4 or 5 inches in circumference," containing a "brown looking" substance "like weeds" (Tr. 19-20).

Appellant was detained on suspicion of possessing marijuana and the bag was impounded. A search of appellant's cabin aboard the vessel was then performed but proved fruitless, and appellant was turned over to local law enforcement authorities. Since it was Sunday, the inspector did not deliver the bag and contents to the customs laboratory until the next morning. In the interim, he had sealed and placed identifying marks on the bag and locked it in his office safe. The customs chemist corroborated the inspector's delivery of the sealed bag and its contents to him. (Tr. 43).

Under the suspicious circumstances recited above, wherein a seaman wearing a trench coat, appears to be making his exit out of an international pier area where his vessel is tied up, we believe that the search carried out by the customs inspector upon appellant was reasonable, and thus authorized under laws pertaining to a "border" search.[6] Furthermore, we agree with the examiner's reasoning in drawing the inference from the inspector's testimony that the bag of marijuana belonged to appellant. Possible inferences argued for appellant that the bag might have been there beforehand, and that the protuberance felt by the inspector was a "medical phenomenon," such as a swelling or growth on appellant's back, are extremely remote and were properly rejected by the examiner. Weight against appellant's remaining argument that the inspector did not actually see the bag fall to the ground, there was overriding circumstantial evidence, including the bag's proximity to appellant's left foot, coupled with reliable and direct sensory evidence, that the bag on the ground fell at the

[6] 19 U.S.C. 482, 1581.

very time the inspector lost contact with an object fitting the description inside the appellant's trench coat. Accordingly, in our view, the factual findings of the examiner were based on reasonable inferences not contrary to the weight of the evidence.

With respect to sanction, we find that appellant's possession of marijuana was wrongful, the quantity involved (66 grams) was substantial, and such offense renders him an unacceptable risk for future employment aboard the United States merchant vessels. The revocation order is necessary and appropriate, as a remedial measure, since appellant represents a constant threat, in himself and because of his harmful influence as a carrier of marijuana upon other seamen, to the overall discipline and safe operation of any ship on which he might serve.

One final matter deserves brief comments. Appellant's counsel argued that another Coast Guard examiner's dismissal of a case in 1965, in which a seaman had been charged with misconduct for possession of a marijuana cigarette alleged to have fallen at his feet during a customs search, should serve as a precedent in this case. The issue of possession was factually resolved in both cases, and the examiner in this case was obviously not bound by the findings of fact made previously by another examiner in another case.[7]

A 1968 decision in a criminal case was also cited to the examiner, wherein a seaman's motion to suppress evidence of marijuana found on his person during a customs search was granted, and the criminal charge dismissed, by a judge of the Criminal Court of the City of New York. Finally, to the Commandant it was argued that the criminal charge against this appellant for possession of marijuana "based on the same evidence"[8] that was before the examiner, had been dismissed in the New York City court, and thus required dismissal of the misconduct charge against the appellant in this proceeding.

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[7] We have no occasion to review the Commandant's holding that "even when an examiner has dismissed a charge on a question of law his decision is not binding upon another examiner in another case." That question does not arise in this case and is reserved.

[8] This was simply alleged. Evidence which might have been presented in court is not shown. From the court record submitted, we do not know the basis for the decision, which might have had nothing to do with the merits, as, for example, a dismissal for lack of prosecution.

As dispositions made at the criminal trial level, these decisions have no bearing on the administrative proceeding before us, other than the consideration which might be given to whatever reasoning was employed by the court. It suffices for us to find that they are neither controlling nor persuasive decisions, based on our review of the meager documentation (photocopies of docket entries) submitted by appellant's counsel.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of the Commandant affirming the examiner's revocation of appellant's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

REED, Chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)